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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: EAC 01 025 51750 Office: Vermont Service Center Date: MAY 29 2002

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as a stonemason. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the filing date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's filing date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's filing date is January 12, 1998. The beneficiary's salary as stated on the labor certification is $30.69 per hour or $63,835.20 per annum.

Counsel initially submitted a copy of the petitioner's 1998 Form 1120 U.S. Corporation Income Tax Return which reflected gross

receipts of $986,927; gross profit of $24,253; compensation of officers of $0; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of -$11,070.

The director concluded that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage as of the filing date of the petition. On June 1, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 12, 1998, to include the petitioner's 1999 and 2000 federal tax returns.

In response, counsel submitted W-2 Wage and Tax Statements for the beneficiary which showed he was paid $11,700.00 in 1998, $15,735.00 in 1999, and $19,100.00 in 2000, and copies of the petitioner's 1999 and 2000 Form 1120 U.S. Corporation Income Tax Return. The 1999 federal tax return reflected gross receipts of $1,455,102; gross profit of $92,611; compensation of officers of $0; salaries and wages paid of $0; and a taxable income before net operating loss deduction and special deductions of $3,292. The 2000 federal tax return reflected gross receipts of $1,652,379; gross profit of $303,236; compensation officers of $76,600; salaries and wages paid of $81,400; and a taxable income before net operating loss deduction and special deductions of $17,242.

The director determined that the additional evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly.

On appeal, counsel argues that "by having the services of the beneficiary, on a full-time basis, the petitioner will be able to diminish his use of subcontractors to complete masonry work and increase the amount of salary paid to the beneficiary."

Counsel's assertion that the funds paid to independent contractors could be used to pay the beneficiary's salary is not persuasive. These funds were not retained by the petitioner for future use. Instead, these monies were expended on compensating the contractors, and therefore, not readily available for payment of the beneficiary's salary in 1998. In addition, it is noted that in each year the taxable income and the wage paid to the beneficiary does not equal the amount of the proffered wage. Based on the evidence submitted, it cannot be found that the petitioner had sufficient funds available to pay the beneficiary the proffered wage at the time of filing the application for alien employment certification as required by 8 C.F.R. 204.5(g)(2).

After a review of the federal tax returns, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered at the time of filing of the petition and continuing to present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.